**For External Use**

## Critical Concerns with the Proposed "Water of the U.S." Rule

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) have released a proposed rule to revise the definition of "waters of the United States" (WOTUS) for all Clean Water Act (CWA) programs. Despite the agencies' claims to the contrary, the definitional changes contained in the proposed WOTUS rule would significantly expand federal control of land and water resources across the Nation, triggering substantial additional permitting and regulatory requirements.

### Proposed WOTUS Rule Is Still Substantially Flawed

Despite agencies' assertions, the proposed rule contains many of the same flaws as the leaked, draft proposed rule that so concerned stakeholders and the public.:

- **Broader in Scope**: *The agencies assert that the scope of CWA jurisdiction is narrower under the proposed rule than that under the existing regulations, and that the proposed rule does not assert jurisdiction over any new types of waters.*
  - But the proposed rule provides essentially no limit to CWA federal jurisdiction. It establishes broader definitions of existing regulatory categories, such as tributaries, and regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

- **Inconsistent With Supreme Court Precedent:** *The agencies state that the proposed rule is consistent with the Supreme Court's decisions in SWANCC and Rapanos and is therefore, narrower than the existing regulations.*
  - The Supreme Court has made clear that there is a limit to federal jurisdiction under the CWA, specifically rejecting the notion than any hydrological connection is a sufficient basis to trump state jurisdiction. The proposed rule will extend coverage to many features that are remote and/or carry only minor volumes, and its provisions read together provide no meaningful limit to federal jurisdiction.

- **Adversely Affects Jobs and Economic Growth:** *The agencies state that the proposed rule will benefit businesses by increasing efficiency in determining coverage of the CWA.*
  - In reality, the proposed rule will subject more activities to CWA permitting requirements, NEPA analyses, mitigation requirements, and citizen suits challenging the applications of new terms and provisions. The impact will be felt by entire regulated community and average Americans, including small landowners and small businesses least able to absorb the costs. The potential adverse effect on economic activity and job creation in many sectors of the economy has been largely dismissed by the agencies and certainly are not reflected in EPA's highly flawed economic analysis for the proposed rule. Neither do the agencies adequately addressed the effect on state and federal resources for permitting, oversight, and enforcement.

- **Prejudges the Science:** *The agencies state that the rule is based on EPA's draft scientific study on the connectivity of waters and is therefore supported by the latest peer-reviewed science.*
  - But EPA's Science Advisory Board panel is still in the process of peer-reviewing the draft connectivity report and, at its December 2013 meeting, the panel identified significant deficiencies with the report. Moreover, it does not appear that the agencies intend to give the public an opportunity to review the final connectivity report as part of the WOTUS rulemaking.

- **Fails to Provide Reasonable Clarity:** *The agencies state that the proposed rule will provide clarity for the regulated public and the agencies.*
  - Yet, the proposed rule leaves many key concepts unclear, undefined, or subject to agency discretion. For example, the rule asserts jurisdiction over waters or wetlands located within the "floodplain" or "riparian area" of a water of the U.S., but leaves to the agencies' "best professional judgment" to determine what flood interval to use or what constitutes the riparian area. Such vague definitions and concepts will not provide the intended regulatory certainty and will likely result in litigation over their proper meaning.

**Interpretative Rule Governing Exemptions for Farming, Ranching, and Forestry Provides Insufficient Protections**

The rule continues existing statutory and regulatory exemptions from Section 404 permitting requirements for normal farming, silviculture and ranching practices where these activities are part of an ongoing farming, ranching or forestry operation. In tandem with the proposed rule, the agencies have issued an "interpretive rule" that was not a part of the leaked version.

- The interpretive rule is immediately effective and expands the list of existing agricultural exemptions to include an additional 53 activities that are exempt from permitting requirements so long as they are conducted consistent with Natural Resources Conservation Service (NRCS) conservation practice standards.

- In addition, the exemptions apply only so long as the conservation activities are ongoing. They do not apply if there is a change of use. Indeed, once conservation activities are complete, the landowner will likely have features that will be higher quality and more likely to be considered waters of the U.S.

- EPA and the Corps will enter into a Memorandum of Agreement with the NRCS to develop and implement a process for identifying, reviewing, and updating NRCS agricultural conservation practices and activities that would qualify for the exemption.

**Concerns with the Interpretative Rule**:

- The agencies' discussion of the agricultural exemptions is misleading and intended to minimize opposition to the rule. But the interpretive rule has no effect on CWA jurisdiction, *i.e.*, the exemption is not an exclusion from federal CWA jurisdiction. In addition, these newly created permit exemptions, created by interpretive rule, which is essentially nothing more than agency guidance, do not have the force of law. Therefore, it is disingenuous for the agencies to suggest that by expanding the list of activities that are exempt from 404 permitting requirements mitigates the effect of the rule.

- Additional problems with the agency's approach include: (1) activities are only exempt from permitting when conducted consistent with NRCS guidelines; (2) questions arise about who will inspect and enforce compliance with NRCS guidelines; (3) questions arise about whether third parties have the ability to challenge exempt status; (4) concern with EPA involvement in NRCS programs through development of the Memorandum of Agreement that has yet to be developed; (5) questions arise about whether this is an interpretive or a legislative rule under the Administrative Procedures Act.